(7)

IN THE
UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
JUL 15 2004
OFFICE OF THE CLERK

CARMAN L. DECK,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

No. 04-5293

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Rosemary E. Percival, attorney for Petitioner, Carman L. Deck, who is incarcerated in the Potosi Correctional Center, Missouri Department of Corrections, to ask leave to file the attached Petition for Writ of Certiorari in the Supreme Court of the United States without prepayment of costs and to proceed *in forma pauperis*. Leave was granted allowing Petitioner to proceed *in forma pauperis* in the Circuit Court of Jefferson County, Missouri, and the Supreme Court of the State of Missouri. The Petitioner's affidavit in support of this Petition is attached hereto.

Respectfully submitted,

Rosemary E. Percival
MOBar #45292
Attorney for Appellant
818 Grand Boulevard, Suite 200
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Supreme Court, U.S.
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(10)

CERTIFICATE OF SERVICE

I, Rosemary E. Percival, hereby certify that on this 15th day of July, 2004, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

Rosemary E. Percival

IN THE
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CARMAN DECK,

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vs.

STATE OF MISSOURI,

Respondent.

No. 04-5293

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Carman Deck, being first duly sworn according to law, depose and state that I am the Petitioner in this cause. Moreover, in support of my application for leave to proceed *in forma pauperis* pursuant to Rule 46 without being required to prepay costs or fees, I state:

1. I have been incarcerated in Missouri Correctional Facilities since April 27, 1998.

2. I am not employed and have not been employed since I was taken into custody on July 8, 1996.

3. I receive no income for any business, profession or other form of self-employment, or in the form of rent payment, interest, dividends or other sources.

4. I do not own any cash and I have no checking or savings accounts.

5. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

6. Because of my poverty, I am unable to pay the costs of this case.

7. I am unable to give security for this case.

8. I believe I am entitled to the redress I seek in this case.

9. The nature of the case is briefly stated as follows:

I was found guilty of two counts of first degree murder, §565.020, RSMo 2000; one count of first degree burglary, §569.160, RSMo 2000; one count of first degree robbery, §569.020, RSMo 2000; and two counts of armed criminal action, §571.015, RSMo 2000. I was sentenced to death in the Circuit Court of Jefferson County, Missouri. My petition that is filed concurrently with this Affidavit and Application seeks review of that judgment.

On May 25, 2004, the Missouri Supreme Court affirmed the sentence imposed by the trial court (the conviction itself had previously been affirmed). The Missouri Supreme Court subsequently denied my motion for rehearing on July 1, 2004. My attorney argued the constitutionality of the sentence imposed to the Missouri Supreme Court.

10. Unless I am permitted to proceed *in forma pauperis* with my Petition for Writ of Certiorari, I will be subject to execution under the mandate of the Missouri Supreme Court without having had the opportunity to present substantial constitutional questions to this Court. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Carman L. Deck
Carman Deck

Subscribed and sworn to before me this 8th day of July, 2004.

Catherine L. Luebbering
Notary Public

" NOTARY SEAL "
Catherine L. Luebbering, Notary Public
St. Louis City, State of Missouri
My Commission Expires 6/18/2007

My Commission Expires: 6-18-07

Supreme Court, U.S.
FILED
JUL 15 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
NO. _____

CARMAN L. DECK,

Petitioner,

v. **CAPITAL CASE**

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ROSEMARY E. PERCIVAL
OFFICE OF THE STATE PUBLIC DEFENDER
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
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Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED:

Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

LIST OF PARTIES

The Petitioner, Carman L. Deck, appears through Rosemary E. Percival, Office of the State of Missouri Public Defender, 818 Grand Boulevard, Suite 200, Kansas City, Missouri 64106-1910.

The Respondent, State of Missouri, appears by Jeremiah (Jay) Nixon, Attorney General of Missouri, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

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The Court should grant the writ to determine whether the 5th, 6th, 8th, and 14th Amendments are violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed. The Court has held that a defendant in guilt phase may not be visibly, physically restrained except as a last resort and only to further an essential state interest specific to each trial. Because the Court has not expressly applied this in penalty phase as well, some trial courts force defendants in capital penalty phase proceedings to be visibly restrained, without following the guidelines set forth by this Court. The State of Missouri, in particular, fails to require that visible physical restraints in penalty phase be used only as a last resort and only to further an essential state interest specific to the trial, and furthermore fails to treat the unwarranted shackling in penalty phase as a constitutional error subject to the harmless error rule of Chapman v. California.

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28 U.S.C. 1257(a) 1

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Carman L. Deck, the Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court. That Court affirmed Petitioner's convictions and sentence and denied relief.

OPINION BELOW

The Missouri Supreme Court's opinion, which is set forth in the Appendix at A1-10, is reported at State v. Deck, SC 85443, 2004 WL 1152872 (Mo. banc May 25, 2004).

JURISDICTION

The Missouri Supreme Court issued its opinion on May 25, 2004 (App. at A1-10). Petitioner's timely motion for rehearing (App. at A11-22) was denied on July 1, 2004 (App. at A23). This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. **Fifth Amendment**: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

2. **Sixth Amendment**: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. **Eighth Amendment**: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. **Fourteenth Amendment, Section 1**: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Carman Deck confessed to robbing and killing an elderly couple, James and Zelma Long, at their home on July 8, 1996 (Tr.436-37; Ex.69). He explained that he knew the Longs kept

large sums of money in a safe in their bedroom (Tr.439; Ex.69). He and his sister knocked on the Longs' door and asked for directions (Tr.440; Ex.69). The Longs invited them in and gave them the directions (Tr.440; Ex.69). As Deck headed to the door, he pulled a gun from where it had been hidden in his pants, pointed it at the Longs, and ordered them to lay on their bed (Tr.441; Ex.69). Deck took about $410 from the Longs (Tr.443; Ex.69).

For ten minutes, Deck stood at the foot of the Longs' bed wondering what to do (Tr.442; Ex.69). He "was nervous [and] didn't know what to do. I knew they'd already seen me and if I walked out of there and let them lay there I was in trouble anyway" (Ex.69). He simply did not know what to do (Ex.69). He was scared and nervous (Tr.450; Ex.69).

Deck's sister had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.69; Tr.442). Deck heard her run out to the car and the screen door slam shut (Ex.69). He was left "standing in there not knowing what to do, knowing that they already seen me. If I left I was going to go to jail. If I shot them I was going to jail. And just, uh, nervousness and sacredness. I just shot them" (Ex.69;Tr.442). Deck shot Mr. Long twice in the head, and then immediately shot Mrs. Long twice in the head (Tr.442;Ex.69).

Deck was charged with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary (L.F.54-56,61-63). In 1998, he was convicted of all counts and sentenced to death (Tr.406).

On appeal, the Missouri Supreme Court affirmed the convictions and death sentences. State v. Deck, 994 S.W.2d 527 (Mo.banc 1999). After Deck filed a motion for postconviction relief, however, the Missouri Supreme Court remanded for a new penalty phase. Deck v. State, 68 S.W.3d 418, 422 (Mo.banc. 2002).

Prior to the retrial, defense counsel filed a motion requesting that Deck be allowed to proceed through the penalty phase without restraints (L.F. 183-94). Defense counsel argued that forcing Deck to appear throughout penalty phase while restrained would violate his rights to due process, to equal protection, to remain silent, and to freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution (L.F. 183). The court denied the motion (L.F. 49).

Shortly after voir dire started, defense counsel objected that Deck was in leg-irons and handchains, and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The court ruled, "[t]he objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (Tr.74). Defense counsel then asked the jury panel whether anyone would be affected by Deck's shackles; no one responded that it would have any affect (Tr. 165). Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause because they had seen the restraints (Tr.257). The court overruled the motion (Tr.257).

At the penalty phase retrial, evidence was presented as set forth above. After six hours of deliberations, the jury returned verdicts recommending death (Tr.563). The court overruled the motion for new trial and imposed death (Tr.565,570-71).

On appeal, Deck argued that the trial court abused its discretion in overruling his "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the entire penalty phase in both leg irons and handcuffed with a belly chain. He argued that forcing Deck to appear before the jury in this manner deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from

cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Missouri Supreme Court stressed that the trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. State v. Deck, 2004 WL 1152872 (Mo.banc, May 25, 2004), at*1. It held that sufficient evidence in the record supported the court's use of restraints, such as (1) the assumption that Deck was at risk to flee, since he was a repeat offender, who killed the victims to avoid being returned to custody; (2) defense counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase;" and (3) Deck did not claim that the restraints impeded him from participating in the proceedings. *Id.*, at *2. The Missouri Supreme Court further held that, "[e]ven assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice." *Id.* The court stressed that the venire panel was questioned in voir dire, and all members responded that Deck's appearance in shackles would not affect their decision. *Id.*

REASON FOR GRANTING THE WRIT

The Court should grant the writ to determine whether the 5th, 6th, 8th, and 14th Amendments are violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed. The Court has held that a defendant in guilt phase may not be visibly, physically restrained except as a last resort and only to further an essential

state interest specific to each trial. Because the Court has not expressly applied this in penalty phase as well, some trial courts force defendants in capital penalty phase proceedings to be visibly restrained, without following the guidelines set forth by this Court. The State of Missouri, in particular, fails to require that visible physical restraints in penalty phase be used only as a last resort and only to further an essential state interest specific to the trial, and furthermore fails to treat the unwarranted shackling in penalty phase as a constitutional error subject to the harmless error rule of Chapman v. California.

This Court has not yet addressed whether a defendant may be forcibly shackled and handcuffed during a capital penalty phase trial. But it has made crystal clear that "no person should be tried while shackled and gagged except as a last resort." Illinois v. Allen, 397 U.S. 337, 344 (1970). After all, several "inherent disadvantages and limitations" arise with the use of restraints. First, "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id.* Additionally, the use of restraints "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* Finally, one of the defendant's primary advantages of being present at trial – the ability to communicate with counsel – is greatly reduced when the defendant is totally restrained. *Id.* Notably, the Court did not ground its aversion to restraints on how they could affect the presumption of innocence, which is so crucial in guilt phase but obviously not at issue in penalty phase. In fact, the Court never mentioned the presumption of innocence.

Six years later, when considering whether a defendant could be forced to proceed to trial in prison clothing, the Court held that certain practices pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." Estelle v. Williams,

425 U.S. 501, 503-504 (1976). The Court held that forcing a defendant to appear in prison clothing does not further an essential state interest yet threatens the presumption of innocence and violates the defendant's right to equal protection. *Id.*, 505-506,512. "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.*, at 504-505.

In Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986), the Court confirmed that practices such as shackling and other overt displays of security are inherently prejudicial and "should be permitted only where justified by an essential state interest specific to each trial." The Court noted that "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large." *Id.*

I. The Restrictions on Shackling Should Apply to Penalty Phase Just as in Guilt Phase:

A capital sentencing must proceed with the utmost reliability, since the stakes are so high and so irreversible. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). An integral part of the jury's determination of whether a defendant should be sentenced to death is the threat of danger he poses to his community. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system"). Shackling a defendant during the penalty phase drastically tilts the scales in favor of the state by creating the ever-present risk that the jurors will presume that the defendant is dangerous and therefore worthy of a death sentence. Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991).

The prejudice from shackling may be even greater at penalty phase than at the guilt-innocence phase, since the jury is assessing the defendant's dangerousness and risk of future

violence and "might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987). The issue to be decided at penalty phase – whether the defendant must be put to death – is as important as any issue determined at a regular criminal trial.

Shackles and other restraints tacitly communicate to the jury that the court believes the defendant is still so dangerous that he must be restrained even in the confines of the courtroom. Thus, the restraints present aggravating evidence that the defendant has no means to confront. Denying the defendant the chance to present evidence that he will behave well in prison if spared a death sentence warrants a new penalty phase. Skipper v. South Carolina, 476 U.S. 1, 5, 8-9 (1986). So too, denying the defendant the chance to confront evidence that he will behave badly must warrant a new trial. After all, future dangerousness should only be determined only "when the convicted felon has the opportunity to present his own side of the case." Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

Federal courts have gone so far as to recognize the need to restrict the use of shackles and other restraints in civil cases. Civil commitment proceedings are analogous to penalty phase, since neither involves the question guilt or innocence, and both have a critical focus on whether the defendant is dangerous. In Tyars v. Finner, 709 F.2d 1274, 1285 (9th Cir. 1983), the Ninth Circuit reversed Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity." The federal court held that, without a showing that the restraints were necessary or

that less restrictive means could not have achieved the same purpose, the circumstances "deprive[d] the ... proceeding of the appearance of evenhanded justice which is at the core of due process." *Id.*, *quoting* Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

So, too, in a civil rights action brought by a prison inmate, the inmate may not be forced to wear shackles unless there is extreme need. Lemons v. Skidmore, 985 F.2d 354, 357-58 (7th Cir. 1993). The Seventh Circuit held:

> In a civil case, the plaintiff is still entitled to a fair trial in which the jury decides the case based on admissible evidence. The shackles suggest to the jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury.

Id., at 357.

A. Jurisdictions Applying Restrictions to Penalty Phase:

Most jurisdictions have applied these principles as stringently – or more stringently – in penalty phase as in guilt phase. For example, in Roche v. Davis, 291 F.3d 473, 484 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit held that the defendant was not denied his right to the effective assistance of counsel by his attorney's failure to object to his appearance in shackles in guilt phase. But the Seventh Circuit held that the defendant's right to the effective assistance was violated by the attorney's failure to object to the shackles in penalty phase. *Id.* Because the mitigating evidence was strong, and the jury deliberated in penalty phase eight hours without being able to recommend a death sentence, a reasonable probability existed that the shackling made a difference in the outcome of the trial. *Id.*

In Laird v. Horn, 159 F.Supp.2d 58, 99-102 (E.D.Pa. 2001), the federal district court granted habeas relief when the defendant was forced to wear handcuffs and shackles in penalty phase even though defense counsel did not object. The court recognized that "shackling

petitioner during the penalty phase could have created the presumption in the minds of the jurors that petitioner was dangerous and worthy of the death sentence.... This risk is ever-present in a death penalty case." *Id.*, at 101, *citing* Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991).

In Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995), the Ninth Circuit concluded that "the constitutional rules regarding shackling at trial apply equally in the sentencing context."

> In the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence. "[N]ot all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons." Unlike prison clothes, physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person. Therefore, in the absence of a compelling need to shackle the defendant during his sentencing hearing, such a practice is inherently prejudicial.

Id. (internal citations omitted).

In Elledge v. Dugger, 823 F.2d 1439, 1450-52 (11th Cir. 1987), the Eleventh Circuit granted the defendant a new penalty phase due to shackling, because there was no showing that shackling was necessary, or that the court considered alternatives to shackling. The Eleventh Circuit stressed that "there seems to be no reason to restrict the principles [of the Supreme Court decisions] to the guilt-innocence phase of the trial. *Id.*, at 1451. It went as far as to say:

> Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital case trials are bifurcated. We think Holbrook means what it says.

Id., at 1451, fn22; *see also* Bello v. Florida, 547 So.2d 914 (Fla.1989) (shackling of defendant during penalty phase was prejudicial error where trial court overruled objection without making any inquiry into necessity for shackling).

B. Jurisdictions Not Applying Restrictions:

In contrast, some jurisdictions do not hold trial courts to the demands of the Supreme Court trilogy of Illinois v. Allen, Estelle v. Williams, and Holbrook v. Flynn. They instead reason that since the defendant has been convicted, there is no longer a presumption of innocence. These courts tend to hold that the fact of a murder conviction in itself warrants shackling, regardless of the individual facts of the case. They do not require the courts to use shackling as a last resort, or to ensure that the shackling furthers an essential state interest specific to the trial.

In Canape v. State, 859 P.2d 1023, 1028 (Nev. 1993), the defendant was shackled during penalty phase on the justification that he had just been convicted of first degree murder and therefore represented a safety and flight risk. Nothing but the fact of the conviction supported the fear that the defendant would be a safety risk or would attempt to flee. *Id.* The Nevada Supreme Court upheld the judge's decision to shackle, because "a defendant's constitutional right to appear before a jury free of prison clothing and restraints no longer exists at a penalty hearing because public safety concerns are accorded greater significance once a jury returns a finding of guilt." *Id.*

So, too, the Missouri Supreme Court appears to believe that shackling is warranted in penalty phase merely upon the fact of a conviction. In the instant case, Deck had given absolutely no indication of a wish to escape and had not been violent or aggressive. State v. Deck, SC 85443, 2004 WL 1152872 (Mo. banc May 25, 2004). This was a penalty phase retrial, and Deck had not been shackled at the first trial. Nor had Deck caused any problems at the first trial. The only basis given by the trial court was the fact that Deck had been convicted of murder (Tr.74).

The Missouri Supreme Court upheld the trial court's rationale. Deck, 2004 WL 1152872, at *1-2. It held that the shackling was warranted given the fact that Deck was a repeat offender (his priors were all for non-violent crimes) and he had killed his two victims to avoid being prosecuted for robbing them. *Id.*, at *2. The Missouri Supreme Court did not follow this Court's instruction that shackling be employed only as a last resort, and only to further an essential state interest specific to Deck's trial.

II. Because Unwarranted Shackling is Constitutional Error, the Burden Falls on the State to Show that the Error was Harmless

As well as flouting this Court's holdings in the trilogy of Illinois v. Allen, Estelle v. Williams, and Holbrook v. Flynn, Missouri flouts this Court's holding in Chapman v. California, 386 U.S. 18, 24 (1967). Chapman holds that once an error of constitutional dimension has been found, the burden falls on the state to show that the error was harmless beyond a reasonable doubt, in order to avoid retrial. *Id.*

Instead, Missouri places the burden on the defendant to show that he was prejudiced by the constitutional error. The Missouri Supreme Court held that:

> Even assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.

Deck, 2004 WL 1152872, at *2. The court stressed that the venire panel was questioned in voir dire, and all members responded that Deck's appearance in shackles would not affect their decision. *Id.*

The Missouri Supreme Court refused to consider this Court's instruction that practices such as shackling are "inherently prejudicial." Holbrook, 475 U.S., at 568.

Furthermore, this Court has specifically recognized that jurors' responses in voir dire may not necessarily be dispositive of the prejudice engendered by inherently prejudicial practices like shackling. *Id.*, at 570. "If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.*, *quoting* Estes v. Texas, 381 U.S. 532, 542-43 (1965). The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Holbrook, 475 U.S., at 570. The proper inquiry is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play." *Id.*, *quoting* Estelle, 425 U.S. at 505; *see also* Lovell v. State, 702 A.2d 261, 273-74 (Md. 1997) (restraining a defendant is so inherently prejudicial that a new penalty phase was warranted even though the court actually instructed the jurors to disregard the shackling and handcuffs).

The court's order requiring the full restraints – made without good cause, without consideration of less prejudicial measures, and over timely objection – deprived Deck of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In this close penalty phase, where the jury deliberated six hours, too great a danger exists that the jury's deliberations were affected by its viewing Deck in shackles and handcuffed to a belly chain throughout the entire proceedings. This Court must grant certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Rosemary E. Percival
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Kansas City, Missouri 64106
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CERTIFICATE OF SERVICE

I, Rosemary E. Percival, hereby certify that on this 15th day of July, 2004, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

Rosemary E. Percival

IN THE SUPREME COURT OF THE UNITED STATES
NO. _____

CARMAN L. DECK,

Petitioner,

v. CAPITAL CASE

STATE OF MISSOURI,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Westlaw.

2004 WL 1152872
--- S.W.3d ---
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Only the Westlaw citation is currently available.

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Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carman DECK, Appellant.

No. SC 85443.

May 25, 2004.

Background: Defendant filed motion for postconviction relief from murder conviction and death sentence, alleging ineffective assistance of counsel. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. The Supreme Court reversed, holding that failure to offer proper mitigation instructions during penalty phase was ineffective assistance of counsel, 68 S.W.3d 418. After new sentencing hearing, the jury again recommended two death sentences, and judgment was entered consistent with that recommendation. Defendant appealed.

Holdings: The Court of Appeals, Ronnie L. White, C.J., held that:
(1) officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information;
(2) trial court was justified in requiring defendant to be restrained in courtroom throughout trial;
(3) any error in trial court's decision to restrain defendant was harmless;
(4) trial court's unobjected-to pattern penalty-phase jury instructions did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt;
(5) trial court's unobjected-to failure to administer short-form jury recess instruction did not amount to plain error;
(6) victim-impact evidence of chart depicting murder victim's family tree was admissible;
(7) victim-impact evidence of narrative statement of murder victim's son was admissible;
(8) victim-impact testimony of murder victim's daughter referencing victim's 11-year-old granddaughter's fear of coming to court was admissible;
(9) portion of State's closing jury argument in which it asked jurors to think about murder victims prior to their death was appropriate reference to record and response to defense argument;
(10) venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence;
(11) jury's recommendation that defendant be sentenced to death was supported upon unanimous finding of six aggravating factors; and
(12) omission of statutory aggravating factors from indictment did not deprive trial court of jurisdiction to impose death penalty.

Affirmed.

[1] Criminal Law ⇐419(3)

110k419(3) Most Cited Cases

[1] Criminal Law ⇐419(13)
110k419(13) Most Cited Cases

Police officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information, to explain

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why police began search for defendant and a house-to-house search that ultimately led to discovery of murder scene.

[2] Criminal Law ⇐419(1)
110k419(1) Most Cited Cases

A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.

[3] Criminal Law ⇐419(3)
110k419(3) Most Cited Cases

Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.

[4] Criminal Law ⇐637
110k637 Most Cited Cases

Trial court was justified in requiring defendant, accused of murder, to be restrained in courtroom throughout trial, with leg irons, handcuffs, and belly chain, where defendant's trial counsel made no record of jury's awareness of restraints, and evidence demonstrated a flight risk, defendant, a repeat offender, having allegedly killed his two victims to avoid apprehension.

[5] Criminal Law ⇐637
110k637 Most Cited Cases

Challenging the trial court's discretion to impose security by restraining a defendant during jury trial is an individual and fact-specific inquiry.

[6] Criminal Law ⇐1166.8
110k1166.8 Most Cited Cases

Any error in trial court's decision to restrain defendant in courtroom throughout murder trial, with leg irons, handcuffs, and belly chain, was harmless, since showing of restraints, by itself, did not demonstrate prejudice, and when questioned during voir dire, jurors stated that defendant's appearance in shackles would not affect their decision.

[7] Sentencing and Punishment ⇐1780(3)
350Hk1780(3) Most Cited Cases

[7] Sentencing and Punishment ⇐1789(3)
350Hk1789(3) Most Cited Cases

Trial court's unobjected-to pattern penalty-phase jury instructions following defendant's conviction for murder, in which State sought death penalty, did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt, nor amount to plain error. MAI Criminal 3d Nos. 313.41A et seq., 313.44A et seq.

[8] Sentencing and Punishment ⇐1789(3)
350Hk1789(3) Most Cited Cases
Grounds

Trial court's unobjected-to failure to administer short-form jury recess instruction during penalty phase of murder trial, requiring jurors to abstain from discussing case with anyone until case was submitted for deliberations, did not amount to plain error, where jury had heard instruction multiple times throughout course of trial, and there was no evidence indicating violation of instruction by any juror by discussing the case or by forming an opinion prior to completion of case. MAI Criminal 3d No. 300.04, subd. 2.

[9] Criminal Law ⇐1038.1(2)
110k1038.1(2) Most Cited Cases

To establish that an unobjected-to instructional error rose to the level of plain error, the appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.

[10] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact evidence of chart depicting murder victim's family tree, with 46 named family members, was admissible during penalty phase of trial, even though chart contained names of several family members who had not yet been born at time of murder, and spouses who were no longer part of victim's family, where such information was provided to jury, which was free to decide what impact, if any, victim's death had on those absent

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family members.

[11] Sentencing and Punishment ⇐1752
350Hk1752 Most Cited Cases

The trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital murder case.

[12] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim impact evidence is admissible during the penalty phase of a capital murder case under the federal and state Constitutions, and the state is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.

[13] Sentencing and Punishment ⇐310
350Hk310 Most Cited Cases

Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. U.S.C.A. Const.Amend. 6

[14] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact evidence of narrative statement of murder victim's son during punishment phase of trial was admissible to help prevent him from breaking down emotionally or from making impermissible statements.

[15] Witnesses ⇐235
410k235 Most Cited Cases

The form of witness examination in a criminal trial, whether in a narrative or interrogatory manner, is a matter committed to discretion of the trial court.

[16] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact testimony of murder victim's daughter during penalty phase of trial, referencing her daughter's fear of coming to court, was admissible absent showing that statement would somehow allow jurors to speculate that her fear was related to defendant's presence in courtroom.

[17] Criminal Law ⇐723(1)
110k723(1) Most Cited Cases

[17] Criminal Law ⇐726
110k726 Most Cited Cases

Portion of State's closing jury argument in which it asked jurors to think about murder victims during the moments prior to their deaths, "on their stomachs begging for their lives for ten minutes," was appropriate reference to record and response to defense argument, and thus, trial court was under no obligation to sustain defendant's objection to argument.

[18] Criminal Law ⇐708.1
110k708.1 Most Cited Cases

[18] Criminal Law ⇐1154
110k1154 Most Cited Cases

The trial court has broad discretion in controlling the scope of closing argument and the trial court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant.

[19] Criminal Law ⇐723(4)
110k723(4) Most Cited Cases

"Improper personalization" in closing argument occurs when the argument suggests a personal danger to the jurors or their families.

[20] Criminal Law ⇐723(4)
110k723(4) Most Cited Cases

Arguing for jurors to supplant themselves in the position of a party or a victim is improper personalization that can only arouse fear in the jury.

[21] Jury ⇐108
230k108 Most Cited Cases

Venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence during voir dire in capital murder case; two prospective jurors indicated that they had a problem with

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considering the death penalty and that they believed punishment should be limited to life imprisonment without parole.

[22] Jury ⇦104.1
230k104.1 Most Cited Cases

Venirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the trial court's instructions and their oaths.

[23] Jury ⇦126
230k126 Most Cited Cases

A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the trial court's instructions in a first degree murder case.

[24] Jury ⇦108
230k108 Most Cited Cases

A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury.

[25] Sentencing and Punishment ⇦1661
350Hk1661 Most Cited Cases

[25] Sentencing and Punishment ⇦1788(6)
350Hk1788(6) Most Cited Cases

Jury's recommendation that defendant be sentenced to death for double homicide, rather than a product of passion, prejudice, or any other arbitrary factor, was supported upon unanimous finding of six aggravating factors, and sentence was neither excessive nor disproportionate to penalties imposed in similar cases, considering the crime, strength of evidence, and the defendant. V.A.M.S. §§ 565.032, subd. 2(2, 4, 7, 10, 11), 565.035, subd. 3.

[26] Indictment and Information ⇦113
210k113 Most Cited Cases

Omission of statutory aggravating factors from indictment charging defendant with first-degree murder did not deprive trial court of jurisdiction to impose death penalty; single offense of murder was recognized by sentencing statute as qualifying offense for death sentence.

Rosemary E. Percival, Office of the Public Defender, Kansas City, MO, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Evan J. Buchheim, Asst. Atty. Gen., Jefferson City, MO, for Respondent.

RONNIE L. WHITE, Chief Justice.

I.

*1 A jury convicted Appellant, Carman Deck, of two counts of first-degree murder and recommended a sentence of death for each count. [FN1] Judgment was entered consistent with the recommendation. Appellant moved for postconviction relief after his convictions and sentences were affirmed on direct appeal. [FN2] This Court remanded for a new penalty phase, finding that trial counsel's failure to offer proper mitigation instructions during that phase of the trial constituted ineffective assistance of counsel. [FN3] On retrial, the jury recommended two death sentences, and judgment was entered consistent with that recommendation. Appellant now asserts nine points of error with his resentencing. This Court has jurisdiction pursuant to Mo. Const. art. V, sec. 3. Affirmed.

II.

In his first point, Appellant contends that the trial court abused its discretion by allowing the admission of a double hearsay statement made to Deputy Sheriff Donna Thomas. Charles Hill made the original statement to Tonia Cummings, who in turn relayed it to Deputy Thomas. The statement was a warning that a robbery and possible murder were going to occur in rural DeSoto, Missouri, involving an elderly gentleman.

[1][2][3] "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of

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the statement for its value." [FN4] Charles Hill's statement was offered to explain why the police began a search for the Appellant and a house-to-house search that ultimately led to discovery of the crime scene. Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity. [FN5] The trial court did not abuse its discretion when allowing the admission of this out-of-court statement.

III.

[4] Next Appellant asserts that the trial court abused its discretion by overruling his motion to appear at trial free of restraints. Appellant believes having to appear before the jury wearing leg irons and handcuffed to a belly chain violated his rights to due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment.

[5] The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. [FN6] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." [FN7] "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." [FN8] Recognizing this discretion, however, this Court does not minimize in any way its concern for maintaining a jury that is not prejudiced by extra-judicial influences and passions. Challenging the trial court's discretion to impose security by use of restraints is an individual and fact-specific inquiry.

*2 Trial counsel made no record of the extent of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings. There is also evidence that there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody. While this does not represent a comprehensive list of factors this Court would analyze in making determinations on this issue, there is sufficient evidence in the record to support the trial court's exercise of its discretion to deny Appellant's motion.

[6] Even assuming, arguendo, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced. Appellant offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice. [FN9] Moreover, the venire panel was questioned in voir dire, and all members responded that Appellant's appearance in shackles would not affect their decision.

IV.

[7] In Appellant's third point, he argues that the trial court plainly erred when submitting penalty phase instructions numbers 7, 8, 12, and 13. He contends that these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that mitigating circumstances were insufficient to outweigh the evidence of aggravating circumstances. Appellant believes the wording of the instructions could have allowed the jury to infer that the burden of proof was lower than beyond a reasonable doubt. Having not raised this issue at trial, review is under the plain error standard. [FN10]

These instructions are derived from section 565.030.4 and were appropriately patterned after MAI-CR 3d 313.41, and 313.44. [FN11] This Court recently addressed this claim and found no error with these patterned instructions. [FN12] The MAI instructions are constitutional, and there was no plain error in law with their delivery to the jury. [FN13] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value. [FN14]

V.

[8] Appellant's fourth point raises the issue of whether the trial court erred by failing to read to the

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jury MAI-CR 3d 300.04.2--the short version of the jury recess instruction. [FN15] Appellant claims that the jury's verdict was affected because the court failed to provide the short version of the instruction when: (1) the court divided the jury panel into small groups for death qualification, (2) the small groups returned to the larger group, (3) the proceedings ended on the first and second days of trial, and (4) the parties rested their cases. Defense counsel failed to timely object to this alleged error, so this Court reviews for plain error. [FN16]

*3 [9] To establish that the instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict. [FN17] The jury recess instruction directs the jury not to discuss the case with anyone, including the other jury members, or express or form an opinion of the case until it is submitted for the jury's decision. [FN18]

The Notes on Use for MAI-CR 3d 300.04 state that the long version, 300.04.1, entitled, "At the First Recess and Adjournment," shall be read at the conclusion of voir dire and if recess occurs during voir dire than it shall also be read at that time. The short version of this MAI, 300.04.2, is entitled, "At Subsequent Recesses or Adjournments," and the Notes of Use state that it may be given in any other form so long as it complies with section 546.230.

The record reveals that, while Appellant's claimed omissions did occur, the panel was given the full instruction prior to the noon recess during voir dire, again prior to individual voir dire in the afternoon and again when voir dire was completed. During the death qualification phase, the jurors were not in recess while the smaller groups were interviewed to trigger the need to read the instruction. The instruction was again delivered prior to a recess for dinner, and after dinner the jury was assembled and instructed to return home and pack to prepare for hotel sequestration. On the second day of trial, the instruction was given at every recess, but not at the day's adjournment. On the third day of trial, the instruction was given at every recess except for the one occurring after both parties had rested and before the instruction conference began. The jury heard the instruction multiple times throughout the course of Appellant's trial, and Appellant offers no evidence that any juror violated the instruction by engaging in discussion about the case or by forming an opinion prior to the completion of the case. The trial court did not so misdirect or fail to instruct the jury that it is evident the instructional error affected the jury's verdict. Appellant's claim fails to establish plain error for the limited omissions in repeating the recess instruction.

VI.

[10] Appellant next argues the trial court abused its discretion with the admission of victim-impact evidence. Specifically, he asserts that an extensive family tree from the victim's family, a narrative statement by the victim's son, and an alleged hearsay statement that the victim's granddaughter was worried and afraid to come to court were excessive and prejudicial.

[11][12][13] "[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital case." [FN19] Victim impact evidence is admissible under the United States and Missouri Constitutions, and the State is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family. [FN20] "[V]ictim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair." [FN21]

*4 The chart depicting the victim's family tree, with 46 named family members, was found by the trial court to be less prejudicial than having each of these individuals testify. The chart did contain the names of several family members who had not yet been born at the time of the murders and spouses that were no longer part of the family. This information was provided to the jury; however, the jury was free to decide what impact, if any, the victims' deaths had on those absent family members.

[14][15] The narrative statement, read by the victims' son, was intended to help prevent him from breaking down emotionally or from making impermissible statements. It was the same statement

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that was read at Appellant's first trial, and being narrative as opposed to interrogative does not constitute a per se abuse of discretion. [FN22] As Appellant points out, this statement did include the remark, "How senseless this was to take the nucleus of our family away." However, this remark is not inconsistent with other remarks contained within the narrative, and Appellant provides nothing more than speculation in his attempt to claim that this narrative, or the individual statement, was in any way prejudicial.

[16] Finally, with regard to the victims' daughter's testimony referencing the eleven-year-old granddaughter's fear of coming to court, this would only be a natural response for any child having to attend a courtroom proceeding. Appellant again fails to substantiate his clam that this statement would somehow allow jurors to speculate that her fear was related solely to Appellant's presence in the courtroom.

In short, all of Appellant's assertions regarding the victim impact evidence are unsubstantiated and based totally in speculation. Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered.

VII.

[17] In his sixth point, Appellant argues that the trial court abused its discretion by allowing the State, over objection, to personalize its closing argument. Appellant claims that the prosecutor urged the jurors to "relive" the final ten minutes of the victims' lives when they begged for mercy while the Appellant contemplated if he would murder them. Appellant believes that allowing this alleged improper argument deprived him of rights to due process, a fair trial and impartial jury, and freedom from cruel and unusual punishment.

[18][19][20] "The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant." [FN23] "Improper personalization in closing argument occurs when the argument suggests a personal danger to the jurors or their families." [FN24] Arguing for jurors to supplant themselves in the position of a party or a victim is also improper personalization that can only arouse fear in the jury. [FN25]

*5 In Appellant's closing argument, defense counsel stated that this was not a planned murder and that Appellant was scared and nervous. Counsel also states, "... and he made a lousy, lousy decision. He never should've shot. He never should be beea [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob."

In response to this argument that the murder was not planned, the prosecutor in his closing argument states, "Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes."

The evidence of the ten minutes elapsing between the time the victims were ordered to lay on the bed in the positions described and the time of their being shot was properly in the record, and it was not improper to reference these facts in closing argument. The specific reference to these facts in the prosecutor's statements above addressed the credibility of Appellant's claim that the murders were committed without more than a split second's worth of thought. The trial court did not abuse its discretion when overruling Appellant's objection, and there is no evidence, beyond speculation, that the decision to allow the prosecutor's argument to proceed resulted in prejudice to the defendant.

VIII.

[21][22][23] Appellant next asserts that the trial court abused its discretion when overruling his objection to striking venirepersons Richard Overmann and Michael Schaeffer for cause. However, "[v]enirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths". [FN26] "A challenge for cause will be sustained if it appears that the venireperson

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cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case." [FN27]

[24] The transcripts show that both prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole. There was serious equivocation expressed by Mr. Overmann and Mr. Schaeffer about their ability to follow the instructions of the court and their ability to consider and recommend the full range of punishment for Appellant. "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury." [FN28] The trial court did not abuse its discretion when sustaining the prosecutor's motion to strike.

IX.

[25] Appellant raises, as his eighth point, this Court's independent proportionality review and advocates for reducing his sentence to life imprisonment without parole. Under section 565.035.3, this Court is required to determine whether:

*6 (1) The sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) The evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

The trial court's findings are next reviewed to determine if the evidence supports, beyond a reasonable doubt, the existence of an aggravating circumstance and any other circumstance found. In Appellant's first trial, the jury unanimously found six statutory aggravating circumstances as a basis for considering the two death sentences. [FN29] The same evidence was heard in Appellant's retrial of the penalty phase, and it amply supports the statutory aggravators found by the jury when delivering its recommendation for the death sentence.

Finally, this Court has upheld sentences of death in similar cases where the defendant murdered multiple victims, acted for pecuniary gain, or where the defendant sought to eliminate possible witnesses to avoid a lawful arrest. [FN30] The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

X.

[26] Appellant finally argues that the trial court lacked jurisdiction and authority to sentence Appellant because the state failed to charge him with "aggravated first-degree murder." Appellant contends that failure to plead facts, as listed in section 565.030.4, creates a charge of murder whereby the maximum penalty was life in prison.

This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty. [FN31] Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense. [FN32] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value. [FN33]

XI.

The judgment is affirmed.

All concur.

FN1. Appellant was also convicted of two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for which he received, respectively, concurrent life sentences, consecutive thirty-year sentences, and a fifteen-year sentence.

FN2. *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999).

FN3. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

FN4. *Smulls v. State*, 71 S.W.3d 138, 148 (Mo. banc 2002).

FN5. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

FN6. *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999).

FN7. *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

FN8. *Id.*

FN9. *State v. Hall*, 982 S.W.2d 675, 685 (Mo. banc 1998); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997); *State v. Clements*, 849 S.W.2d 640, 647 (Mo.App.1993).

FN10. Rule 30.20.

FN11. All statutory citations refer to RSMo 2000 unless otherwise noted.

FN12. *State v. Taylor*, --- S.W.3d ----, 2004 WL 1049169 (Mo. banc 2004), slip opinion pages 13-14, (SC85235, decided May 11,2004).

FN13. *Lyons v. State*, 39 S.W.3d 32, 43 (Mo. banc 2001).

FN14. Rule 30.25.

FN15. Appellant also brought a claim of instructional error with regard to MAI-CR 3d 302.02, but expressly abandoned that claim per letter to this Court dated March 2, 2004.

FN16. Rules 28.03 and 30.20. See also *State v. Wurtzberger*, 40 S.W.3d 893, 897-98 (Mo. banc 2001).

FN17. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

FN18. MAI-CR 3d 300.04.2.

FN19. *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000).

FN20. *Deck*, 994 S.W.2d at 538-39; *Payne v. Tennessee*, 501 U.S. 808, 822-25, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

FN21. *Id.*

FN22. *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App.1985). The form of witness examination at trial, whether in a narrative or interrogatory manner, is also a matter committed to discretion of the trial court. *Id.* On direct appeal from Appellant's first convictions and sentences, this Court rejected Appellant's argument that the narrative statement produced emotional

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outbursts so prejudicing his trial that a mistrial was warranted. *Deck*, 994 S.W.2d at 538-39.

FN23. *Deck*, 994 S.W.2d at 543.

FN24. *State v. Bristol*, 98 S.W.3d 107, 115 (Mo.App.2003).

FN25. *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003).

FN26. *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000).

FN27. *Id.*

FN28. *Id.*

FN29. The jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). *Deck*, 994 S.W.2d at 545.

FN30. *State v. Ringo*, 30 S.W.3d 811(Mo. banc 2000).-- *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).

FN31. *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

FN32. *Id.* See also *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002).

FN33. Rule 30.25.

2004 WL 1152872, 2004 WL 1152872 (Mo.)

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IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
Respondent,	)	
vs.	)	**No. 85443**
CARMAN DECK,	)	
Appellant.	)	

APPELLANT'S MOTION FOR REHEARING

AND SUPPORTING SUGGESTIONS

COMES NOW the appellant, Carman Deck, by and through undersigned counsel, and, pursuant to Missouri Supreme Court Rule 30.26, moves that this Court rehear this cause because the Court has overlooked and misinterpreted material matters of law and fact. In support of this motion, Mr. Deck states as follows:

1. Mr. Deck was convicted of two counts of first-degree murder and was sentenced to death. This Court had previously affirmed the convictions, but reversed the death sentences. Deck v. State, 68 S.W.3d 418 (Mo.banc 2002). On May 25, 2004, this Court affirmed the death sentences.

Penalty Phase Instructions that Ignore this Court's Specific Language

in *State v. Whitfield*

2. In holding that the penalty phase instructions properly instructed the jury on the burden of proof regarding steps 2 and 3 of the death eligibility process, the Court overlooks material matters of law, namely its own holding in State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003).

3. In Whitfield, this Court specifically held that the state must establish step one and step two and step three of the death eligibility process beyond a reasonable doubt:

> The Supreme Court held [in Ring] that **not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed** must be found by the jury. And, in determining which factors fall within this rule, Ring cautioned that, "the dispositive question ... 'is one not of form, but of effect.'" *Id.* at 602, 122 S.Ct. 2428, *quoting* Apprendi, 530 U.S. at 494, 120 S.Ct. 2348. **"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it must be found by a jury beyond a reasonable doubt."** *Id.* at 602, 122 S.Ct 2428.

Whitfield, 107 S.W.3d at 257 (emphasis added). This Court had already explained in the opinion that "the first three of these steps require factual findings be made in order to render the defendant eligible for the death penalty." *Id.*, at 256. Thus,

this Court acknowledged that not just step one, but steps two and three also, must be found by the jury beyond a reasonable doubt. *Id.*, at 256-57.

4. The death penalty instructions fail, because they fail to instruct the jury that the state must establish steps two and three beyond a reasonable doubt, as Whitfield mandates. Although instructions 16 and 17 were correctly patterned after the MAI-CR3d, the pattern instructions do not conform with the substantive law as set forth by Ring and Whitfield and must be changed. *See* State v. Carson, 941 S.W.2d 518, 520 (Mo.banc 1997) (MAI-CR and its Notes on Use are "not binding" to the extent they conflict with the substantive law).

5. In rejecting this argument, the Court relies on its recent opinion in State v. Taylor, SC#85235. Slip op. at 5. In Taylor, the Court held that since the burden of proof is adequately set forth regarding step one of the death-eligibility process, the jury would automatically know that the same burden of proof applied to steps two and three. Actually, the presence of the burden of proof language as to step one, and the absence of that language as to steps two and three must have led the jurors to believe that there was no such burden as to steps two and three. Nowhere do the instructions tell the jury that the state carries the burden of proof – beyond a reasonable doubt – as to steps two and three. Both this opinion and Taylor must be reconsidered.

Inherently Prejudicial Practice – Shackles and Handcuffs

6. During the entire penalty phase, Carman Deck was forced to wear leg-irons and was handcuffed to a belly chain within full view of the jury.

7. The United States Supreme Court has held that "inherently prejudicial" practices such as shackling "should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 569 (1986).

8. This Court's opinion conflicts with Holbrook, because it lowers the bar for shackling to such a degree as to authorize shackling for any speculated reason rather than as a last resort to support "an essential state interest specific to each trial." This Court holds that the shackling was justified out of the fear that Mr. Deck might flee, since he was "a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." Slip op. at 3-4. The trial court failed to set forth any reasons for the shackling; and it failed to show that the shackling was a last resort. We cannot now speculate about and provide those reasons for the trial court. Furthermore, although it's true that Mr. Deck was a repeat offender, his prior offenses were all non-violent: he had been convicted of aiding an escape about twenty years prior to this trial, but had never himself tried to escape (Tr. 402-406). Mr. Deck did nothing to disrupt the proceedings at either this trial or his prior trial. Through this opinion, the Court communicates to trial courts that virtually any justification will

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suffice to fully shackle defendants in full view of the jury. The opinion eviscerates the demanding standard set forth by Holbrook.

9. This Court also holds that, "[n]either being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice." Slip op. at 4. But, if that is not enough, how would a defendant ever be able to show prejudice? The opinion seems to require some sort of communication from the jurors, either as a note to the court or as a post-trial affidavit, for the defense to be able to expressly show that the jurors were affected by viewing the defendant in shackles. This would place an undue burden on defense counsel and the jurors who had already made numerous sacrifices of their time and effort.

10. This Court holds that Mr. Deck was not prejudiced by the restraints, because the jury was questioned about the restraints in voir dire and none responded that seeing Mr. Deck in chains would affect them. Slip op. at 4. In Holbrook, however, the United States Supreme Court shot down that very argument. 475 U.S. at 570. There, the state argued that the defendant suffered no prejudice from extra courtroom security, because the jurors were questioned about it in voir dire. *Id.* The Supreme Court recognized that jurors, at the start of the trial, may not be able to articulate how an inherently prejudicial practice like shackling would affect them. *Id.* It held that jurors' responses in voir dire are not dispositive of the prejudice engendered by inherently prejudicial practices like shackling. *Id.* "If 'a procedure employed by the State involves such a probability

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that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.* The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Id. The analysis must focus on whether the risk was present, not whether the jurors could recognize the risk. *Id.*

11. In demanding that Mr. Deck show prejudice, the Court overlooks that the Supreme Court has instructed that practices such as shackling are "inherently prejudicial." The proper question should be, "Is there an unacceptable risk of prejudice in having the jury view Mr. Deck while shackled to a belly chain and in leg-irons throughout the entire penalty phase proceedings?" The risk was unacceptable, because there was no need for the shackles, and they were not used as a last resort. The full restraints unjustly presented visual evidence – that Mr. Deck could not confront – that even now, years after his crime, he should be considered an extremely dangerous man who could not behave even within the confines of the courtroom, or that he posed a great risk to escape.

12. The Court finds that trial counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase." Slip op. at 3. The Court overlooks that defense counsel made a record of the shackles prior to trial, during the trial, and after the trial. Shortly after voir dire started, defense counsel objected that Mr. Deck was in leg-irons and handchains and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The statement that the restraints made Mr. Deck appear dangerous to the jury necessarily communicated that the jury could see the restraints. During voir dire, defense counsel spoke to the jury about the restraints, stating that "the other thing about Carman that you all either do or will know is that there's chains on him" (Tr.165). Obviously, the jury was able to see the restraints; otherwise, the comment would have made no sense. Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause, because seeing Mr. Deck shackled would make the jurors believe that he is violent and would do something in the courtroom or to the jurors (Tr. 257). In the motion for new trial, defense counsel stated that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or standing when the judge and jury entered or left the room (Supp.L.F.4-5). At no time, did the state ever dispute defense counsel's statements that the jury could see Mr. Deck in the restraints. So too, the prosecutor did not refute defense counsel's statement that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or

standing when the judge and jury entered or left the room (Supp.L.F.4-5). Defense counsel made an adequate record that the jury was able to view the restraints numerous times throughout the trial. This Court must grant rehearing.

Double Hearsay:

Tonia Cummings to Charles Hill to Deputy Thomas to the Jury

13. Mr. Deck argued that the state should not have been allowed to elicit from Deputy Thomas that Charles Hill told her that his former girlfriend, Tonia Cummings, stated that she and Mr. Deck were going to commit "a robbery and possible murder ... in rural DeSoto [of] an elderly gentleman" (Tr.281-82). After eliciting the hearsay testimony from Deputy Thomas, the state referred to the "robbery and possible murder" two more times during her testimony (Tr.282,284). The state also referred to it in closing argument (Tr. 548).

14. In rejecting Mr. Deck's argument, the Court's opinion completely overlooks Crawford v. Washington, 124 S.Ct. 1354 (2004), where the United States Supreme Court held that the Confrontation Clause bars testimonial hearsay, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness. *Id.*, at 1365, 1369. Testimonial statements include those like Charles Hill gave to Deputy Thomas, "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 1364.

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15. "The unpardonable vice of the Roberts test ... is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.*, at 1371. That is the same problem here. The Confrontation Clause forbids the introduction of any testimonial out-of-court statement when the declarant is unavailable to testify. Here, the testimonial out-of-court statement was offered as substantive evidence, as well as to explain the police officers' subsequent conduct. The trial court did nothing to ensure that the jury did not consider the evidence substantively; and the state, in fact, urged the jury in closing argument to consider it substantively, over defense counsel objection.

16. This Court holds that "Charles Hill's statement was offered to explain why the police began a search for [Mr. Deck] and a house-to-house search that ultimately led to discovery of the crime scene." Slip op. at 2. In so holding, the Court overlooks the role this testimony played. The hearsay testimony communicated to the jury that before Mr. Deck went into the house, he was contemplating robbing and potentially murdering at least one victim. This testimony directly conflicted with Mr. Deck's statement to the police that he went to the house to rob, and he killed the victims – not because of a thought-out plan to do so – but because he was scared and nervous and didn't know what to do (Ex.69). Without the hearsay testimony, the state had no evidence that Mr. Deck had planned on killing either of the victims before he arrived at the house. The hearsay testimony elevated Mr. Deck from a burglar/robber who placed himself in

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a bad situation and then, under pressure, made an abysmal decision; to a cold-blooded killer who went to the house with a design to rob and kill.

17. This Court holds that "[s]tatements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity." Slip op. at 2. The holding overlooks that Hill's out-of-court statement exceeded the scope of any issue relevant to this penalty phase retrial. Hill's hearsay was not even relevant to the initial guilt phase – at the initial trial, the state made its entire case without ever mentioning the specific details of Hill's statement. Details as to why the police searched for Mr. Deck were not relevant to this penalty phase retrial and should have been excluded.

18. The Court's holding overlooks State v. Garrett, 2004 WL 840672 (Mo. App., 4/21/04), and other Missouri caselaw. *See also* State v. Robinson, 111 S.W.3d 510, 514 (Mo.App. 2003); State v. Shigemura, 680 S.W.2d 256, 257-58 (Mo.App. 1984); State v. Kirkland, 471 S.W.2d 191, 194-95 (Mo. 1971). Those cases hold that the state may not elicit out-of-court statements to explain police officers' subsequent conduct as a pretext for eliciting harmful hearsay. Garrett, 2004 WL 840672, at 4-5; Robinson, 111 S.W.3d at 514; Shigemura, 680 S.W.2d at 257-58; Kirkland, 471 S.W.2d at 194-95. The state must avoid eliciting harmful hearsay and can do so by eliciting that the officer engaged in certain conduct "upon information received" rather than going into the details of that information.

Garrett, 2004 WL 840672, at 4-5; Robinson, 111 S.W.3d at 514; Shigemura, 680 S.W.2d at 257-58; Kirkland, 471 S.W.2d at 194-95.

19. Because the hearsay testimony exceeded the scope necessary to explain subsequent police conduct and was the only evidence as to a key point in the jury's determination of Mr. Deck's sentence, this Court must grant rehearing.

WHEREFORE, for the foregoing reasons, Carman Deck requests that this Court withdraw its opinion and grant his motion to rehear this cause, in order to protect Mr. Deck's rights to due process of law, a fair trial, equal protection, presumption of innocence, proof beyond a reasonable doubt, fair, reliable and proportionate sentencing, to confront and cross-examine the witnesses against him, to a trial before a fair/impartial jury, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), 19, and 21 of the Missouri Constitution.

Respectfully submitted,

Rosemary E. Percival, #45292
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(816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to: Evan Buchheim, The Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109, on the 8th day of June, 2004.

Rosemary E. Percival

Rosemary E. Percival

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July 1, 2004

Ms. Rosemary E. Percival
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Kansas City, MO 64106

In Re: State of Missouri, Respondent, vs. Carman L. Deck, Appellant.
Missouri Supreme Court No. SC85443

Dear Ms. Percival:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled. Execution set for October 8, 2004."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc
Mr. Evan J. Buchheim/Office of Missouri Attorney General

No. SC85443

Jefferson County Circuit Court Case No. CR196-1084FXJ2

In the Supreme Court of Missouri

May Term, 2004

State of Missouri,

Respondent,

v. APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

Carmen Deck,

Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jefferson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said Carmen Deck, appellant herein, by the said Circuit Court of Jefferson County be in all things executed on Friday the 8th day of October, 2004.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2004, and on the 25th day of May 2004, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of July 2004.

Clerk

D.C.